Office-Supreme Court, U.S.
FILED
DEC 1 1961

IN THE

Supreme Court of the United States

October Term, 1961

No. 21

MARIO DiBELLA,

Petitioner.

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

JEROME LEWIS,
Attorney for Petitioner.
66 Court Street,
Brooklyn 1, New York.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

INDEX

AUTHORITIES

Cases

IN THE

Supreme Court of the United States

October Term, 1961

No. 21

MARIO DIBELLA,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I. Applicability of the Order Denying the Motion to Suppress

In its Brief in opposition to the petition for a writ of certiorari, the Government presented only one question, "whether the district court properly denied a motion to suppress evidence obtained during the course of a valid arrest" (Br. in opp. 1). The Government did argue that it did not believe the order appealable (*id.*, 6); that while the decision below is in conflict with *Zacarias* and *Saba*, this conflict cannot justify a grant of the writ of certiorari in the instant case (*id.* 7). But the Government did not request or seek a determination by this Court of the appealability issue.

Now, in the Brief on the merits, the Government devotes more than half its argument to the contention that this Court vacate the judgment of the Court of Appeals and remand the within cause with directions that it be dismissed because the order denying the motion to suppress was interlocutory and non-appealable.

If the Government had wished to overturn that portion of the judgment below which is unfavorable to it (appealability of order), it should have filed a separate petition for certiorari, designated as a cross-petition or a conditional cross-petition asking that it be granted only if the petition in chief were granted. The Government, not having sought review of that portion of the judgment in the court below pertaining to the issue of appealability, cannot now attack it. The question of the appealability of the order denying petitioner's motion to suppress should not be reviewed by this Court.

In *Morley Co.* v. *Md. Casualty Co.*, 300 U. S. 185, 191-192, this Court stated:

> "Without a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. United States v. American Railway Express Co., 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to attack the decree, with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. The rule is inveterate and certain * * * Where each

> party appeals, each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken".

In *LeTulle* v. *Scofield*, 308 U. S. 415, 421-422, this Court said:

> "A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him".

In *Standard Acc. Ins. Co.*, v. *Roberts*, 132 F. 2d 794, 795, (8 Cir.) the court held that since appellees' contentions as to reformation of the policy and as to allowance of attorney fees and penalty seek to change or to add to the relief accorded by the judgment which was in their favor, they can raise such issues only by a cross-appeal.

The motion to suppress was argued in the District Court on August 25, 1959 (R. A. 1). During the oral argument, the District Judge stated, "Any order to be entered on this motion is appealable" (R. 79a).

In its argument before the Court of Appeals, the Government raised the question of appealability and the Court below, citing an unbroken line of cases dating from 1930, stated, "Over a period of many years, this Court has consistently held that where the application is made prior to

the indictment, as it is in this case, that a defendant may appeal to this Court from an order denying his motion to suppress" (R. 94, 105).

If the Government now prevails upon this Court to find that the order denying petitioner's motion to suppress is not appealable and to refrain from judging this cause on its merits, petitioner would be penalized because of his reliance upon a precedent firmly established for the past thirty years by decisions of the Second Circuit and the vast majority of the other Circuits (see Appendix A to this Reply Brief listing all of the pertinent decisions); and by the decisions of this Court in *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Steele* v. *United States*, No. 1, 267 U. S. 498; *Cogen* v. *United States*, 278 U. S. 221, 225; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356; *Carroll* v. *United States*, 354 U. S. 394, 403-404.

If the Government's contention of non-appealability be upheld, then petitioner would be compelled to travel the circuitous route of a trial in the District Court, an appeal to the Court of Appeals, a petition for a writ of certiorari to this Court, and if the petition be granted then and only then would the very grave and important questions as to the unlawfulness and unreasonableness of the search and seizure in this case, questions which this Court has already determined to be worthy of review on the merits, be finally determined. This procedure would be most oppressive and would present a financial barrier that this petitioner could simply never surmount.

The words "final decision" have, as applied to the appealability question here presented, not been understood

in a strict and technical sense but have been given a liberal and reasonable construction. *United States* v. *Cefaratti*, 91 U. S. App. D. C. 297, 202 F. 2d 13, 15.

It is respectfully submitted that this proceeding be judged solely upon its own particular facts and circumstances in regard to the appealability question, taking into consideration petitioner's reliance upon the many decisions of the preponderant number of Courts of Appeals and of this Court and of the grave constitutional questions herein that call for a speedy determination because their resolution is so vital to the administration of justice in the Federal Courts.

If the delay in the prosecution of petitioner were in anywise due to dilatory tactics by him, then the Government's concern "that this delay would interfere seriously in the proper administration of criminal justice", would be more understandable (Gov't. Br. 22). However, a reading of the docket entries in the District Court (R.A., 2a), and petitioner's typewritten reply brief in the Court below, clearly show that any delay in a speedy determination of this proceeding was occasioned by the Government[1] (Appendix B, pp. 3a-5a). At no time has the Government ever denied the statements that appear in said reply brief as to the events depicted therein.

In the event that the Court may decide to resolve the question of appealability, we submit the following additional argument:

---

[1] A certified carbon copy of petitioner's original reply brief was obtained from the Clerk of the Court of Appeals and forwarded to the Clerk of this Court with the request that it be made part of the record.

In *United States* v. *Poller*, 43 F. 2d 911 (2 Cir., 1930), Judge Learned Hand, speaking for the Court, said:

> "If this proceeding had been concluded before indictment found, the order certainly would have been appealable (citing, Perlman v. United States, 247 U. S. 7; Burdeau v. McDowell, 256 U. S. 465). The point here taken is that Poller was indicted before final submission of the proceeding; that immediately upon indictment found, it became a part of the prosecution. Or, if that not be true, then in any event that Poller was arraigned before a commissioner and held to bail before the proceeding was even started. As to the second objection, it is enough to say that the proceedings before the commissioner were in no event part of the prosecution, nor indeed was the commissioner a court at all. * * * It seems to us more reasonable to say that it is the time of the initiation which counts, and for this we have the language of the opinion in Cogen v. United States, 278 U. S. 225. * * * We hold therefore that it is the beginning of the proceeding which determines the appealability of the order, and that since this was before indictment, we have jurisdiction of the cause."

In *Carroll* v. *United States*, 354 U. S. 394, 403-404 (1957) it was stated:

> "Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the *motion is made prior to indictment*. * * * But a motion made by a defendant after indictment and in the district of the trial has none of the aspects of independence just noted, as the court held in Cogen v. United States, 278 U. S. 221."

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, 356, this Court said:

> "When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. * * * It follows that the order of the district court was not made in or dependent upon any case or proceeding there pending and therefore the order as to them was appealable."

The independent character of summary proceedings is clear whenever the motion is filed before there is any indictment or information against the movant. *Cogen* v. *United States,* 278 U. S. 221, 225.

The Government urges this Court to draw a distinction between a motion to suppress which asks for the return of property and one which does not (Gov't. Br. 29, 31, 38, 41, 46-52). This issue was passed upon by this Court in *Carroll* v. *United States, supra* (at 403-404):

> "Earlier cases illustrated, sometimes without discussion that under certain conditions *orders for the suppression or return of illegally seized property are appealable at once,* as where the motion is made prior to indictment * * *.
>
> "We do not suggest that a motion made under Rule 41 (e) gains or loses appealability simply upon whether it asks return or suppression or both" (*id.* n. 404).

The Government cites no case in this Court to sustain its position nor does it make any reference in its brief to the above footnote at page 404 of the *Carroll* case.

When petitioner was arrested and arraigned before a United States Commissioner and bound over for action by a Grand Jury, he was not a defendant in any criminal action but a suspect against whom an indictment or information might never be filed. The papers before the Commissioner are not turned over to the Clerk of the District Court, but remain with the Commissioner until an indictment or information is filed with the Court Clerk. The motion to suppress in this case was made prior to the filing of an indictment. Since there were no papers or proceedings pending in the District Court, this motion was a miscellaneous proceeding (R. A. 1), which required the payment of a $15.00 filing fee. The docket entries do not reflect the filing of the indictment because an indictment is not deemed a part of the miscellaneous proceedings (R. A. 1-2). If petitioner had made his motion to suppress after the indictment had been filed, then it would have received a criminal number and no filing fee would have been required. The fact that an indictment was found subsequent to petitioner's motion to suppress cannot have the retroactive effect of charging petitioner with knowledge that at the time he made his motion to suppress, he knew that in the future he would be indicted. As was said in *United States* v. *Poller, supra,* "it is the beginning of the proceeding which determines the appealability of the order."

Moreover, the proceedings before the Commissioner were in no event part of the prosecution, nor indeed was the Commissioner a court at all. *United States* v. *Poller, supra.*

It was said by this Court in *Go-Bart Co.* v. *United States, supra* (282 U. S. at 354-356):

> "All the commissioner's acts and the things done by the prohibition officers in respect of this matter were

> preparatory and preliminary to a consideration of the charge by a grand jury, and, if an indictment should be found, the final disposition of the case in the district court. The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which the court had authority to take control at any time" (citing cases).

In *Freeman* v. *United States*, 9 Cir., 160 F. 2d 69, 70, the court said:

> "Commissioners proceedings are quasi-judicial in character. The issue before him is not guilt or innocence but probable cause for the arrest of the person charged. After the Commissioner has issued his order for the arrest and commitment of the person complained of, the proceeding before him is ended and his jurisdiction exhausted. It was not until the commissioner's jurisdiction was so exhausted that the instant proceeding was brought before the district court. It is obvious that it was not a part of the commissioner's proceeding of which there had been such final disposition."

In our case, petitioner had waived hearing before the Commissioner, bail was fixed and he was bound over for grand jury action. The Commissioner's jurisdiction was then exhausted and until an indictment was found there were no criminal proceedings pending against petitioner. Since petitioner's motion to suppress was made prior to the indictment, it was made at a time when there were no criminal proceedings against petitioner. His motion to suppress was in the nature of a special proceeding and appealable.

Essgee Company of China v. *United States*, 262 U. S. 151.

II. The Search and Seizure

In the oral argument before the District Court, government counsel stated during the five months lapse of time from October 15th (issuance of warrant of arrest) to March 9th (date of arrest), the agents were trying to find out who was associated with petitioner in the narcotics traffic and not proving successful they went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest (R. 75a-76a). The Court at this point remarked, "Then using the arrest for a basis for making a search of the premises" (R. 76a).

It is conceded by the Government that the narcotic agents had petitioner under *close* surveillance for at least five months before arrest (Gov't Br. 54). They could have apprehended him at anytime on the sidewalk in front of his home. Since there were no special or necessitous circumstances requiring immediate action by the agents,—such as that petitioner was about to flee or contraband would be destroyed (the government never offered any proof to such effect)—there was no reason or justification for them to enter petitioner's apartment and arrest him. The agents undoubtedly knew that if they arrested petitioner on the sidewalk, they could not thereafter search his home and use the arrest as a basis to sustain a warrantless search. A search must be made contemporaneous with the arrest. *Agnello* v. *United States*, 269 U. S. 20.

It was said in *McKnight* v. *United States*, 183 F. 2d 183 297 (C.A.D.C.), that where police officers waited until the defendant had entered his home before arresting him, the real purpose was not to arrest the defendant but to search his apartment and to call this seizure incident to this ar-

rest is like saying that cashing a check is incident to writing it. Means are incident to ends, not ends to means.

See:

United States v. *Johnson*, 113 F. Supp 359 (D.C.); *Accarrino* v. *United States*, 179 F. 2d 456 (C.A.D.C.).

If a narcotics agent be permitted to make a search of a person's residence, particularly in the nighttime, as an incident to a warrantless arrest based on reasonable grounds that the suspect had committed a crime in the past, then such arrest is the equivalent of a general search warrant.

If the judgment of the lower court be affirmed, narcotic agents can blithely ignore the Fourth Amendment by entering a person's dwelling irrespective of the time of night or day upon reasonable grounds to believe that a crime had been committed (in our case six months prior to the arrest) in the absence of special circumstances (suspect about to flee or contraband likely to be destroyed), though there was ample time to obtain a warrant; no crime being committed in their presence or any reasonable grounds to believe that a crime was being committed; and, absent the knowledge that contraband was in the apartment, make an arrest and then search the apartment as an incident thereto. Congress never intended to give such awesome powers to narcotic agents. To do so would emasculate the Fourth Amendment.

The Government in attempting to excuse and explain away the unwarranted and unreasonable delay of six months before arresting petitioner has cited *United States* v. *Rabinowitz*, 339 U. S. 56, and *Carlo* v. *United States*, 286 F. 2d

841 (Gov't. Br. 54-56). These cases indicate the unreasonableness of the arrest of petitioner.

In *United States* v. *Rabinowitz, supra,* page 65, this Court said:

> "The judgment of the officers as to when to close a trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant".

In our case, no crime was being committed in the presence of the agents, nor did the Government ever offer any proof, either orally or by affidavit, that the agents had reasonable grounds to believe that petitioner was committing a crime when they entered his apartment.

In *Carlo* v. *United States, supra,* 286 F. 2d at p. 846, decided February 9, 1961, three months after the decision in the instant case, the Court of Appeals for the Second Circuit speaking through Medina, *J.* said:

> "Delay by enforcement officers in arresting a suspect does not ordinarily affect the legality of the arrest. Here the delay was three months, and we have no reason to suppose that the arrest could have been made sooner than it was made. In DiBella v. United States, decided by this Court on November 23, 1960, and not yet officially reported, Judge Waterman states in his dissenting opinion that DiBella had 'been under surveillance for seven months', before his arrest and after the alleged commission of the crime for which he was arrested. Law enforcement officers have the right to wait in the hope that they may strengthen their case by ferreting out further evidence or discovering and identifying confederates

and collaborators. But every time there is a delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search. (Citing cases). * * * In other words, the delay in making the arrest is one of the factors to be taken into consideration when the time comes for a judicial determination of the question of whether or not the search was 'reasonable'. * * * All the attendant circumstances, including the delay in making the arrest and the reasons for such delay must be taken into consideration".

In *Carlo* v. *United States*, *supra* (p. 849), Smith, *J.*, in a concurring opinion analyzed this facet of the law and said:

"It is not necessary to determine here, however, that the arrest may be justified as of one 'who has committed such violation' solely by the knowledge of the February 17th transaction. Such a justification may be questionable in view of the failure, so far as the record discloses, to make any effort to obtain and serve a warrant in the period between February 17 and May 24. There was plenty of time to obtain a warrant of arrest in the more than three months intervening. While the language of the statute and the legislative history are not specific as to the time within which the stated officers are to act, arrest without warrant may well have been authorized by the Congress primarily in order to permit prompt action in a situation where abandonment or surveillance and delay while obtaining a warrant might cause escape or destruction of evidence. Even a warrant, obtained in obedience to to the Constitutional requirements for warrants of arrest should be executed with reasonable promptness or it may be-

> come stale. United States v. Joines, 258 F. 2d 471 (3 Cir. 1958), Seymour v. United States, 177 F. 2d 732 (D.C. Cir. 1949). An exception by necessity carved out of the Constitutional requirement should not be allowed greater breadth. However, if the agents were reasonably justified in a belief that at the time of the arrest on May 24 or within a reasonable time prior thereto DiCarlo was engaged in a narcotics transaction, the arrest and the subsequent search of the bag must be held valid under the statute * * * ".

In our case, the Government never adduced one iota of proof that at the time of petitioner's arrest, he was engaged in a narcotics transaction. There was no proof that at a reasonable time prior to petitioner's arrest he was engaged in a narcotics transaction (R. 75a-76a). The Government's proof that petitioner had been engaged in narcotics transactions was confined solely to the two affidavits of Agents Moynihan and Costa executed on October 6, 1958, as to events that allegedly occurred on August 26 and September 10, 1958. Based on these two affidavits, Commissioner Abruzzo had denied a search warrant (R. 51a-52a). The September 10th occurrence was six months prior to petitioner's arrest (R. 22a).

A warrant of arrest executed six months after its issuance is unreasonable and stale. *A fortiori*, a warrantless arrest made on reasonable grounds that a suspect had committed a crime six months prior to his arrest is unreasonable and stale.

The search of petitioner's apartment was made incidental to an unreasonable and stale arrest. The search was therefore unlawful and unreasonable.

Conclusion

Petitioner's motion to suppress evidence having been made prior to the filing of an indictment, the order entered thereon was appealable.

The particular facts, circumstances and the over-all atmosphere surrounding the arrest of petitioner and the search of his apartment point to an unreasonable search and seizure in violation of the Fourth Amendment.

The judgment appealed from should be reversed.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

APPENDIX A

First Circuit: Centracchio v. Garrity, 1 Cir, 198 F. 2d 382, 389, cert. denied 344 U. S. 866 (before indictment, order appealable).

Second Circuit: Cheng Wai v. United States, 2 Cir, 125 F. 2d 915 (before indictment, order appealable); United States v. Poller, 2 Cir, 43 F. 2d 911, (after proceedings before commissioner, order appealable).

Third Circuit: United States v. Bianco, 3 Cir, 189 F. 2d 716 (before indictment, order appealable); Re Sana Laboratories, Inc., 3 Cir, 115 F. 2d 717, cert. denied sub nom. Sana Laboratories, Inc. v. United States, 312 U. S. 688 (after indictment, order appealable).

Fourth Circuit: United States v. Williams, 4 Cir, 227 F. 2d 149 (before indictment, order not appealable).

Fifth Circuit: Zacarias v. United States, 5 Cir, 261 F. 2d 416, cert. denied, 359 U. S. 935 (before indictment, order not appealable); Peterson v. United States, 5 Cir, 260 F. 2d 265 (after indictment, order not appealable); United States v. Ashby, 5 Cir, 245 F. 2d 684 (order granting motion to suppress after indictment appealable).

Sixth Circuit: Dowling v. Collins, 6 Cir, 10 F. 2d 62 (order on motion to suppress, final and appealable).

Seventh Circuit: United States v. One 1946 Plymouth Sedan Automobile, 7 Cir, 167 F. 2d 3 (proceeding to suppress after indictment, not appealable; it was not an independent proceeding brought before indictment).

Eighth Circuit: Goodman v. Lane, 8 Cir, 48 F. 2d 32 (appealable, even though indictment later returned).

Appendix A

Ninth Circuit: United States v. Sugden, 9 Cir, 226 F. 2d 281, affirmed mem. 351 U. S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir, 196 F. 2d 874 (before indictment or information, after complaint, arrest, and arraignment, order appealable); Freeman v. United States, 9 Cir, 160 F. 2d 69 (after complaint and hearing before Commissioner, before indictment, order appealable); United States v. Rosenwasser, 9 Cir, 145 F. 2d 1015 (before indictment, order appealable).

District of Columbia Circuit: United States v. Cefaratti, 91 U. S. App. D. C. 297, 202 F. 2d 13 (order granting motion to suppress after indictment appealable, order denying motion to suppress before indictment appealable); Nelson v. United States, 93 App. D. C. 14, 202 F. 2d 505, cert denied 346 U. S. 827 (order entered before indictment filed appealable, order entered after indictment filed usually interlocutory); United States v. Stephenson, 96 U. S. App. D. C., 223 F. 2d 336 (after indictment, order not appealable).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF THE APPLICATION

OF

MARIO DIBELLA

for an order suppressing all evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in premises No. 35-15 80th Street, Jackson Heights, Queens, New York.

MARIO DIBELLA,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

POINT I

THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S MOTION TO SUPPRESS IS APPEALABLE

Appellant was arrested at approximately 8:15 P.M. on March 9, 1959. He was arraigned the following day, where he waived preliminary hearing, was released on bail and

was bound over for grand jury action. On June 17, 1959, notice of the motion to suppress was served and filed on behalf of the Appellant, returnable July 6, 1959. On July 2, 1959, fifteen days after service of the notice of motion to suppress and approximately three months after the Appellant had been arraigned, an indictment was returned against the Appellant.

On July 6, 1959, the return date of the motion, the Government over the strenuous objections of Appellant's attorney obtained an adjournment to August 3rd (45a-46a). On August 3, 1959, the Government obtained another adjournment to August 24th. The motion to suppress was argued on August 25th. The Government requested additional time to file opposing papers, and the request was granted and the Government was advised to have their papers in by September 8th. On September 7th, the Government's request for further time was granted to September 11th (45a-46a).

This chronological sequence of events is set forth for the express purpose of showing that were it not for the procrastination of the Government, this appeal would have been heard last year.

It would be a futile gesture not to decide the appeal at this time and remand it to the attention of the Trial Court. This case cannot be tried until the latter part of the year. In the event of an appeal, it could not be heard until the spring of 1961. Approximately, one year will have elapsed, if this issue is referred to the Trial Court.

It is significant that after the notice of appeal was filed further proceedings remained at a standstill because the Government stated to Appellant's counsel, that a motion

would be made to dismiss the appeal on the grounds that the order denying the motion to suppress was non-appealable. After a lapse of several months, Appellant's counsel was notified to perfect his appeal because the Government on the basis of *Russo* v. *United States*, 241 F. 2d 288 now believed that the said order was appealable.

In view of the aforesaid statement, this turn-a-bout on the part of the Government is surprising. It is not contended that the Government does not have the right to change its mind, but the delay in processing this appeal is attributable solely to the tactics employed by the Government.

This Court in *Cheng Wai* v. *United States*, 2d Cir. 125 F. 2d 915, 916, succinctly and cogently stated its views by saying that since the proceeding to suppress evidence was commenced before any indictment against the Appellant, it is clear upon the authorities, that it is an independent proceeding and the order made therein is appealable.

A motion to suppress made before the return of the indictment, as in our case, is generally regarded as an independent proceeding. The decision on the motion is regarded as a final order and an appeal from that decision may be taken.

United States v. *Poller*, 2d Cir., 43 F. 2d 911
Russo v. *United States*, 2d Cir., 241 F. 2d 288
Perlman v. *United States*, 247 U. S. 7
Application of Fried, 68 F. Supp. 961

Appendix B

POINT II

Agent Costa Did Not Have Sufficient Probable Cause to Arrest DiBella under the Narcotics Control Act.

Agent Costa never had any dealings or conversations with the co-defendant, Panzarella (25a-27a). The alleged conversation had between Agent Moynihan and Panzarella was allegedly told by Moynihan to Costa. This would be hearsay upon hearsay and an unwarranted extension of *Draper* v. *United States,* 358 U. S. 307 and *Jones* v. *United States,* 80 S. Ct., 725.

In *United States* v. *Pearce,* 275 F. 2d 318, the agent who had made the affidavit for a search warrant alleged facts upon information and belief and it developed that his information had been received from his superior officer, who had received it from another F.B.I. agent, who in turn had received the information from an informer. The Court held (p. 324):

> "In our judgment, the affidavit for search warrant was insufficient to justify the issuance of a search warrant, and the search and seizure made pursuant thereto was unlawful and in violation of the constitutional rights of the defendants. It follows that the evidence obtained as a result of such search should have been suppressed."

It is significant that Agent Moynihan was not one of the arresting agents. Agent Costa who made the arrest might have had strong reason to suspect DiBella but that was not enough to support a warrant of arrest.

Appendix B

Henry v. *United States*, 80 S. Ct. 168, 170
Johnson v. *United States*, 333 U. S. 10, 13-15

A fortiori, it would not support an arrest on reasonable grounds under the Narcotics Control Act, since probable cause under the Fourth Amendment and reasonable grounds under the Narcotics Control Act are substantial equivalents.

Draper v. *United States*, 358 U. S. 307

Every case involving the question of an unlawful search and seizure must be decided on its own particular facts.

In our case, the Government takes the incongruous position that since Costa had been told by his fellow agent Moynihan of his (Moynihan's) conversation with Panzarella, that such information coming from Moynihan must be regarded as information coming from a "reliable informant." Whatever information Moynihan received from Panzarella and which he then imparted to Costa could be no better than the information given by Panzarella to Moynihan. The Government at no time in any of the agents' affidavits or in the opposing affidavit of Assistant United State Attorney Charles L. Stewart (8a-31a, incl.) or in its opposing brief has ever characterized Panzarella as a reliable informant. The information given to Moynihan by Panzarella did not come from a reliable informant and it thus follows that Moynihan, when he told Costa of his conversation with Panzarella, did not convey to Costa information from a reliable informant. The title of Federal Agent cannot transform information from an informant to information from a reliable informant.

Appendix B

Under the Narcotics Control Act, a Narcotics Agent has the right to make an arrest where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. *The Act does not state how, where and under what circumstances such arrest can be made.*

In order to justify the entrance into a person's apartment in the night time to make an arrest, the Government has the burden of proving the necessity for such an entry. The fact that subsequent to Appellant's arrest, the Agents found narcotics in his apartment does not justify the arrest.

An arrest is not justified by what a subsequent search discloses.

Henry v. *United States, supra.*

The Government failed to sustain its burden of proof because it did not submit any affidavits from any of the arresting agents to explain or justify its night time entry into Appellant's apartment.

The postulate by the Government that it had reasonable grounds to enter Appellant's apartment, arrest him and search the apartment, must fall because of the rulings of this Court in *United States* v. *Garnes*, 258 F. 2d 530; *United States* v. *Kancso*, 252 F. 2d 220 and *United States* v. *Volkell*, 251 F. 2d 333.

Garnes, Kancso and Volkell explicitly hold that the Government must show that its agents had reasonable grounds to believe that the defendant had committed violations of the narcotic laws; that the agents had reason to believe that contraband was in the premises; that the agents had reason

to believe that evidence or contraband would be removed or destroyed; that the agents had to act at once or the defendant would flee. None of the aforesaid reasons appear in our case. The entry of the agents into Appellant's apartment was unlawful; their arrest invalid; their search illegal.

It is incumbent upon the Government not only to prove its agents had reasonable grounds to make the arrest but it must also prove that the agents had reasonable grounds to enter the apartment to make the arrest.

In *Jones* v. *United States*, 357 U. S. 493, a daytime search warrant had expired and the agents entered petitioner's apartment and proceeded to make a search.

The Government maintained that the search and seizure were justifiable as incident to petitioner's lawful arrest, because they had authority under federal law to arrest without a warrant upon probable cause to believe that a person had committed a felony. The Court said (pgs. 499, 500):

> "• • • These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person believed within upon probable cause, that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.* But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government. The testimony of the federal officers make clear beyond dispute that

> their purpose in entering was to search for distilling equipment, and not to arrest petitioner. Since the evidence obtained through this unlawful search was admitted at the trial, the judgment of the Court of Appeals must be reversed."

The contention of the Government in the present case, that although Appellant was arrested under a warrant of arrest, if the warrant be adjudged invalid, nevertheless, the arrest and search can be justified by recourse to the Narcotics Control Act is not justified by the facts, for the record fails to support this new theory now advanced by the Government.

Moreover, there was no proof adduced by any affidavit from any arresting agent that indicates any reasonable grounds to make a nighttime entry into Appellant's apartment. The record makes clear beyond dispute, that their purpose in entering Appellant's apartment was to search for contraband and not to arrest Appellant.

The Narcotics Control Act was enacted by Congress to aid the Narcotics Bureau in apprehending narcotic traffickers. It was never the intention of Congress in passing this legislation to circumvent the Fourth Amendment. If it was the thought of Congress that the Narcotics Control Act could be used as a substitute for the Fourth Amendment, this legislation would be unconstitutional.

It was said in *Nathanson* v. *United States,* 290 U. S. 41:

> "The Amendment (4th) applies to warrants under any statute, revenue, tariff and all others. No warrant inhibited by it, can be made effective by any act of Congress or otherwise."

Appendix B

In the present case, we find this very unusual situation. An application for a search warrant of Appellant's premises was denied by United States Commissioner Abruzzo on October 6, 1958 (53a). A warrant to arrest the Appellant was issued by United States Commissioner Epstein on October 6, 1958 (21a-22a). This warrant of arrest was invalid because it was issued on a complaint that was unquestionably defective. Parenthetically, it should be noted that the Government realizes the defectiveness of the complaint but attempts to excuse it away by stating in its brief that the complaint was inexpertly drawn. Appellant agrees that the complaint was inexpertly drawn because the complaint does not allege sufficient essential facts constituting the offense charged. In the face of a denial of a search warrant and the utilization of an invalid warrant of arrest, the Government now contends that its agents have the right to arrest the Appellant and search his apartment by virtue of the Narcotics Control Act. However, the agents arrested the Appellant based on a warrant of arrest. The return on the warrant filed by Agent Costa in the Clerk's Office attests to this fact (22a). On the oral argument of the motion, Assistant United States Attorney Stewart said (76a):

> "• • • they (agents) went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest."
>
> The Court: "Then using the arrest for a basis for making a search of the premises."

It is apparent that the thought of arresting Appellant without a warrant never entered the minds of the arresting

agents. This new theory of law now propounded by the Government is purely a creature of the mental creativeness of the United States Attorney.

The Government's contention would, in effect, permit its narcotics agents to enter a suspect's home at any time of the day or night, without a search warrant or a warrant of arrest and in the absence of exceptional circumstances or exigencies as long as the agent believed that he had reasonable grounds under the Narcotics Control Act to arrest the suspect and then as an incident of the arrest to search the apartment. If this contention be correct, then the Fourth Amendment does not apply to the actions taken by a Narcotics Agent.

In *United States* v. *Jeffers,* 342 U. S. 48, the Supreme Court held that the Fourth Amendment applied to the seizure of narcotics. The Court stated that only where it was incident to a lawful arrest or in exceptional circumstances may an exception lie for a search and seizure without a warrant; that the burden is on those seeking the exemption to show the need for it.

POINT III

The Narcotics Found in Appellant's Apartment Were Not Voluntarily Turned Over to the Agents

The Government, in its brief, contends that the Appellant voluntarily turned over the narcotics to the agents. It cites the record (10a) in support of this assertion. A reading of the record reveals that this allegation was made by Assistant United States Attorney Stewart, who was not present

at the time of the arrest. This hearsay statement pertains to evidentiary matter and not to the obtaining of a warrant and must, therefore, be disregarded. Likewise, the further statement of Stewart that when DiBella was brought to the office of the United States Attorney, he (DiBella) admitted he had voluntarily turned over the seized heroin to the agents. Nowhere in his affidavit does Stewart allege that Appellant made this statement to him. This is another hearsay statement that should be disregarded. In contrast to these hearsay statements is the allegation of the Appellant in his sworn affidavit in support of the motion to suppress, wherein he states that agents of the Federal Bureau of Narcotics came into his apartment and after exhibiting to him a warrant of arrest, proceeded to make a general exploratory examination of his apartment (5a).

Assuming arguendo, that the narcotics were voluntarily turned over by Appellant to the agents, if the arrest warrant is invalid or if the arrest was made as a pretext to make a search, then the voluntary turning over the narcotics is of no consequence and the narcotics are inadmissible at the trial of this case.

CONCLUSION

The order denying the motion to suppress should be reversed.

Respectfully submitted,

JEROME LEWIS
Attorney for Appellant

Appendix B

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 12, inclusive, contain a true and complete copy of the Appellant's Reply Brief filed June 13, 1960.

IN THE MATTER OF THE APPLICATION
OF
MARIO DIBELLA,
Appellant,
—against—
UNITED STATES OF AMERICA,
Appellee.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fifth day of October in the year of our Lord one thousand nine hundred and sixty-one, and of the Independence of the said United States the one hundred and eighty-sixth.

A. DANIEL FUSARO
Clerk.

[SEAL]

LIBRARY
SUPREME COURT, U. S.

Nos. 91 and 92

Office Supreme Court, U.S.
FILED
MAR 2 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1961

No. 91

[redacted]

[redacted]

[redacted]

No. 92

[redacted]

[redacted]

[redacted]

[redacted]

CITATIONS

Cases: Page

Cases—Continued

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 21

MARIO DIBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is in response to a request by Mr. Justice Frankfurter, made during the oral argument in these cases, for the reasoning of the courts of appeals on the question of the appealability of orders deciding motions seeking the suppression and/or re-

turn of evidence.[1] In this memorandum, we have summarized the position of each circuit on this issue including the basic rationale and authority which it has relied upon and the present trend, if any, which the more recent decisions seem to reveal. Following each summary, we have listed the relevant decisions in each circuit which our research has disclosed, with a short statement of the pertinent facts and holding in each case. A general summary of the position of the various circuits is set forth in our *Di Bella* brief, at pp. 43–46.

SECOND CIRCUIT[2]

Summary

1. The rule prevailing in the Second Circuit, as illustrated by the decision under review in *Di Bella*, is that the time of the return of the indictment is critical. Even before this Court held in *Carroll* v. *United States*, 354 U.S. 394, that an order entered on a motion to suppress, where the motion was filed after the return of indictment in the district of indictment,

[1] The relevant decisions of this Court are discussed in detail in our brief in *Di Bella*, at pp. 26, 27–34, 39–43, and in our brief in *Koenig*, at pp. 19–22, 25–31, 37–38.

[2] We start our summary and case compilation with the Second Circuit for two reasons: First, the question of appealability with regard to suppression and return motions, particularly before this Court's decision in *Cogen* v. *United States*, 278 U.S. 221, has been most litigated in the Second Circuit; and, second, the Second Circuit first articulated the rule that an order deciding a pre-indictment motion is independently appealable regardless of whether other factors show that the motion is a procedural step in a criminal case.

was interlocutory and not appealable, this was the rule in the Second Circuit. In contrast, the Second Circuit has consistently held that, if the motion to suppress was filed before indictment, the order is independent and appealable even though the motion was filed after a preliminary hearing before a commissioner. In addition, in that court's view the order on a motion brought before indictment does not lose its independent character even if an indictment has been returned before the motion is decided and the order entered.

The leading decision is *United States* v. *Poller*, 43 F. 2d 911, in which an order granting a pre-indictment motion for the return of a customs manifest, bills, records, and a check book seized incident to an arrest was held reviewable on appeal by the government. The decision was rendered after this Court's decision in *Perlman* v. *United States*, 247 U.S. 7, and *Cogen* v. *United States*, 278 U.S. 221 (discussed in our main brief in *DiBella*, pp. 27–34), and to some extent relies on those decisions as authority. But the rationale seems to be based on earlier decisions in the circuit which considered the power and jurisdiction of the district court to entertain summary applications for the return and suppression of evidence.

The jurisdiction of the district court on motions to suppress had been the subject of considerable litigation before the decision in *Poller*. It had been decided—both before and after this Court's decision in *Cogen, supra*—that power existed in the district court to decide a motion to suppress or return only if the material seized was in the possession of an officer of

the district court (*e.g.*, an attorney), or if the motion was incidental to an action already pending in that court, or if it related to a writ or process issued by that court.[5] At the same time the question arose as to whether the district court had power to entertain a motion for the return of property seized under a search warrant which has been issued by a commissioner or magistrate. In *United States* v. *Maresca*, 266 Fed. 713, 723–724 (S.D. N.Y.), where the government sought to overturn a commissioner's decision quashing a search warrant, the district court held it had no power to interfere with that decision because "when a Commissioner issues criminal process, including a search warrant, he does it in and as part of the proceedings of the District Court" as a "judicial officer" who has "equal power with any judge authorized to hold a District Court." The theory of *Maresca* was soon rejected, however, by Judge Learned Hand in *United States* v. *Casino*, 286 Fed. 976 (S.D.N.Y.). In that case Judge Hand stated that proceedings before a commissioner or magistrate, sitting to issue warrants, were not judicial proceedings at all and thus were subject to *de novo* review in the district court. Judge Hand's conclusion in this regard was based, in large measure, on this Court's decision in

---

[5] See, *e.g.*, *United States* v. *Maresca*, 266 Fed. 713 (S.D. N.Y.); *Weinstein* v. *Attorney General*, 271 Fed. 673, affirming *In re Weinstein*, 271 Fed. 5 (S.D. N.Y.); *Cogen* v. *United States*, 24 F. 2d 308, affirmed, 278 U.S. 221; *In re Behrens*, 39 F. 2d 561; cf. *Applybe* v. *United States*, 32 F. 2d 873 (C.A. 9).

Todd v. *United States*, 158 U.S. 278,[4] and his view was thereafter followed by the court of appeals in *In re No. 191 Front St.*, 5 F. 2d 282, 286.

The question of the function and authority of a commissioner reappeared as a critical consideration in the *Poller* case. The government argued that, even though the motion was made before the return of the indictment, the order was not independently appealable because the criminal case had been begun, before the motion had been made, by arraignment proceedings before a commissioner. Judge Hand responded (43 F. 2d at 912), "[a]s to the second objection, it is enough to say that the proceedings before the commissioner were in no event part of the prosecution, nor indeed was the commissioner a court at all." Thus, the reasoning that a preliminary hearing before a magistrate is not part of the criminal case seems to be the basic rationale underlying the Second Circuit rule that pre-indictment motions are not part of the criminal case (regardless of whether they are filed before or after a preliminary hearing) and are therefore appealable as independent proceedings.

The Second Circuit also held in the *Poller* case that the return of the indictment while the motion was pending did not make the order deciding the motion appealable. The court stated that "[c]onceivably it might be held that the proceeding became merged in the indictment, but the result would be

---

[4] In *Todd*, this Court held that, for the purpose of the obstruction-of-justice statute, a preliminary examination before a commissioner was not a case pending in a court of the United States. Compare *Post* v. *United States*, 161 U.S. 583, 587.

to make the appealability of the order depend upon the diligence of the prosecution of the proceeding or of the judge in deciding it, either of which is an unsatisfactory test." 43 F. 2d at 912.

2. The Second Circuit has indicated, consistent with the earlier statement of this Court in *Cogen*, that a suppression order is appealable when the criminal case is pending in another district from that of trial. *United States* v. *Klapholz*, 230 F. 2d 494, certiorari denied, 351 U.S. 924. In *Klapholz*, the court based its decision at least in part on the view that, if the order were held non-appealable in such circumstances, it might still be considered to have a *res judicata* effect (but see our brief in *Koenig*, pp. 23, 26).

The Second Circuit has also held, again like this Court's earlier dictum in *Cogen*, that an order to suppress is independent and appealable when the motion is filed by a stranger to the criminal case. *Weinberg* v. *United States*, 126 F. 2d 1004. And it has indicated that an order denying a motion to suppress a confession on Fifth Amendment grounds is reviewable where the motion is brought before indictment. *In re Fried*, 161 F. 2d 453, certiorari dismissed, 332 U.S. 807.

Cases

1. *Post-indictment Motions.—Wise* v. *Mills*, 189 Fed. 583 (1911), involved an appeal by the United States Attorney from an order granting a post-indictment motion for the return of "books and papers" seized incident to arrest. The court of ap-

peals, without discussion, said that the order was interlocutory and not reviewable. The leading decision holding that an order on a motion brought after indictment is non-appealable is *Coastwise Lumber & Supply Co.* v. *United States,* 259 Fed. 947 (1919), which involved the denial of a post-indictment motion for the return of books, papers, and memoranda seized under search warrants. The court of appeals reasoned that the order was interlocutory since the search warrants were issued in a criminal action, the defendants had been arrested, and they had been indicted. The court stated that the labelling of the action as an independent proceeding could not make an interlocutory order final since the proceeding in effect related to the criminal case. The *Coastwise* case has been generally followed: *Cogen* v. *United States,* 24 F. 2d 308 (1928), affirmed, 278 U.S. 221 (order denying a motion for the return of cards, papers and prescription blanks); *In re Bob,* 76 F. 2d 131 (1935) (order denying the return of books, papers, documents and records, seized under a subpoena *duces tecum*). See also *United States* v. *Kelley,* 105 F. 2d 912 (1939) (order denying a motion for the return of papers); *United States* v. *Hardy,* 252 F. 2d 780 (1958), certiorari denied, 356 U.S. 944.

An exception is *United States* v. *Kirschenblatt,* 16 F. 2d 202 (1926), where the government appealed from an order granting a post-indictment motion seeking the return of papers seized under a search warrant. The court of appeals considered the case on the merits without any discussion of appealability.

This case was referred to in *Cogen, supra,* as an illustration of a special, independent proceeding arising under the National Prohibition Act, which, this Court said, specially provides for "an independent proceeding, for the vacation of a warrant wrongfully issued and for return of property." 278 U.S. at 226. In *Carroll* v. *United States,* 354 U.S. 394, the Court explained this case as one "where the emphasis is on the *return of property* rather than its suppression as evidence." 354 U.S. at 404; emphasis in original.

2. *Pre-indictment Motions.*—The earliest cases in the Second Circuit involving orders on pre-indictment motions were reviewed on the merits without a discussion of appealability: *In re No. 191 Front St.,* 5 F. 2d 282 (1924) (order denying a motion to return books, telegrams, invoices, receipts, and letters seized under a search warrant); *In re Hollywood Cabaret,* 5 F. 2d 651 (1925) (orders denying motions to quash search warrants and for the return of seized alcohol); *Gallagher* v. *United States,* 6 F. 2d 758 (1925) (order denying a petition for the return of liquor seized under a search warrant issued under the National Prohibition Act); *United States* v. *Gowen,* 40 F. 2d 593 (1930), reversed on other grounds *sub nom. Go-Bart Co.* v. *United States,* 282 U.S. 344 (order denying a motion filed after a preliminary hearing for the restoration and suppression of miscellaneous papers seized by prohibition agents incident to arrest). All these decisions, except *Gowen,* were explained in *Cogen, supra,* 278 U.S. at 226, note 3, 227, note 5, as being based on the special procedures of the National Prohibition Act.

The leading pre-indictment case is *United States* v. *Poller*, 43 F. 2d 911 (1930), which we have discussed above (pp. 3–6). The *Poller* rule has been followed with little or no discussion in the following pre-indictment cases: *Lefkowitz* v. *United States Attorney*, 52 F. 2d 52 (1931), affirmed, 285 U.S. 452 (order denying a post-arrest application for the suppression and return of books and papers seized incident to a warrantless arrest); *Connolly* v. *Medalie*, 58 F. 2d 629 (1932) (order denying a post-arrest motion for the suppression of evidence seized in a brewery without a warrant); *In re Milburne*, 77 F. 2d 310 (1935) (order denying a motion for the return of whiskey, books, and papers seized without a warrant); *Landau* v. *United States*, 82 F. 2d 285 (1936) (order denying a petition to suppress a memorandum seized without a warrant); *United States* v. *Edelson*, 83 F. 2d 404 (1936) (appeal by the government from an order granting a post-arraignment motion for the return of alcohol seized without a warrant); *United States* v. *Preisen*, 96 F. 2d 138 (1938) (order denying a post-arrest motion for the suppression and return of alcohol and an automobile seized without a warrant); *Cheng Wai* v. *United States*, 125 F. 2d 915 (1942) (order denying a petition to suppress narcotics seized without a warrant); *United States* v. *Haberkorn*, 149 F. 2d 720 (1945) (order denying a petition for the return of an affidavit seized incident to arrest); *Lagow* v. *United States*, 159 F. 2d 245 (1946), certiorari denied, 331 U.S. 858 (order denying a motion

to suppress business records); *In re Fried*, 161 F. 2d 453 (1947), certiorari dismissed, 332 U.S. 807 (order denying a motion for the return and suppression of books and checks, as well as of a confession, sought to be used before a grand jury); *Lapides* v. *United States*, 215 F. 2d 253 (1954) (order filed after indictment dismissing a motion brought before any criminal action was started to suppress the use before a grand jury of income tax information disclosed to internal revenue agents); *Russo* v. *United States*, 241 F. 2d 285 (1951) (order entered after the return of an indictment denying a motion to suppress income tax information obtained by treasury agents); *DiBella* v. *United States*, 284 F. 2d 897 (1960), pending on writ of certiorari, No. 21 (order made after indictment denying a motion filed after arraignment to suppress narcotics seized incident to arrest); *Greene* v. *United States*, C.A. 2, decided December 5, 1961, pending on petition for a writ of certiorari, No. 55 (order denying a motion to suppress tax records allegedly secured through the deceit of agents of Internal Revenue Service). See also *In re Investigation by Attorney General*, 104 F. 2d 658 (1939) (relying on *Cogen* and *Perlman*, the court of appeals held that an order denying a motion to quash a subpoena *duces tecum* compelling the production of books and records before a grand jury was appealable; this decision was overruled *sub nom. In re Cudahy Packing Co.* in *Cobbledick* v. *United States*, 309 U.S. 323).

3. *Miscellaneous.—In re Brenner*, 6 F. 2d 425 (1925). The court held that an order denying an ap-

plication for the release of liquor seized under the National Prohibition Act, which was filed after the defendant was acquitted on the criminal charge, was reviewable. This case was referred to in *Cogen* for the proposition that motions filed after the criminal prosecution has ended are reviewable. 278 U.S. at 225–226.

Weinberg v. *United States,* 126 F. 2d 1004 (1942). An order was entered denying a petition filed in the Southern District of New York for the return of automobile parts seized in that district under an order of the District Court for the Eastern District of Michigan. The court of appeals pointed out that the movant was a stranger to the criminal proceedings in Michigan and, as to her, the order was final and appealable.

United States v. *Klapholz,* 230 F. 2d 494 (1956), certiorari denied, 351 U.S. 924. After an indictment had been returned in the Eastern District of New York, motions were filed by the defendant in the Southern District of New York to suppress materials seized under search warrants from a safe deposit box and the defendant's apartment, as well as all evidence obtained in the apartment. The court of appeals reviewed the order of the district court as to whether the Fourth or Fifth Amendments were violated, without discussing appealability. In considering whether Rule 5(a) of the Federal Rules of Criminal Procedure was violated, however, the court said that the proceedings on the motion were independent of any criminal case and the order was appealable since it was brought in a district other than that of indictment and therefore might

have a *res judicata* effect. This discussion, while not directed specifically to the motion based on the Fourth Amendment, was implicitly applicable to that motion.

Grant v. *United States*, 282 F. 2d 165 (1960). A pre-indictment order stayed the United States Attorney from submitting to the grand jury records and papers which the movant had made available to the Internal Revenue Service until a hearing was held on the motion to suppress. The court of appeals dismissed the government's attempt to appeal the stay order on the ground that only an order on the merits of the suppression motion would be appealable. The court discussed the general rules of appealability in the circuit, as we have described them.

FIRST CIRCUIT

Summary

The First Circuit's position upon the appealability of suppression orders is similar to that of the Second Circuit. Relying, with little or no discussion, on this Court's decisions in *Perlman* v. *United States*, 247 U.S. 7, *Burdeau* v. *McDowell*, 256 U.S. 465, and *Cogen* v. *United States*, 278 U.S. 220, the First Circuit has said that the appealability of a suppression order depends on whether the motion was made before or after the return of the indictment. *Centracchio* v. *Garrity*, 198 F. 2d 382, certiorari denied, 344 U.S. 866. The court in *Centracchio*, citing the Second Circuit's *Poller* decision, indicated that an order entered on a pre-indictment motion alleging an illegal

search and seizure is appealable even though the indictment was returned before the entry of the order.

Cases

Pre-indictment Motions.—The leading case is *Centracchio* v. *Garrity,* 198 F. 2d 382 (1952), certiorari denied, 344 U.S. 866, which is discussed above. There, the district court, after an indictment was returned, denied a pre-indictment motion to suppress the use before a grand jury of cancelled checks and bank statements given to internal revenue agents. Subsequently, in *Chieftain Pontiac* v. *Julian,* 209 F. 2d 657 (1954), the court reviewed an order entered on a pre-indictment motion for the return of books and papers given to internal revenue agents, without discussion of appealability.

THIRD CIRCUIT

Summary

The Third Circuit has followed the same principle as the Second Circuit with little discussion of the underlying rationale. In *In re Sana Laboratories,* 115 F. 2d 717, certiorari denied, 312 U.S. 688, the court held that an order denying a pre-indictment motion was appealable even though it was entered after the return of the indictment. Recently, one judge has followed that rule with "serious doubts" as to its validity in a case where the pre-indictment motion was filed after the movants had waived a hearing before the commissioner and had been bound over to await grand jury action. *United States* v. *Murphy,* 290 F. 2d 573, pending on a petition for a writ of

certiorari, No. 317, this Term. In that case, Judge Staley, although holding for the court that *In re Sana Laboratories* was controlling, said that he himself believed that the order was interlocutory. Citing *Carroll* v. *United States*, 354 U.S. 394, and the more recent Fifth Circuit decisions (see *infra*, pp. 17–20), he stated that criminal proceedings had been commenced, within the meaning of *Cogen*, "so as to make the order interlocutory and not appealable once the appellants were brought before the Commissioner * * *." 290 F. 2d at 575, note 2.

Cases

1. *Post-indictment Motions.*—In *United States* v. *Wheeler*, 256 F. 2d 745 (1948), certiorari denied, 358 U.S. 873, an order granting a motion to suppress records given to an internal revenue agent was held, with no discussion, to be interlocutory and non-reviewable on appeal by the government. The court relied on *Carroll* v. *United States*, 354 U.S. 394.

2. *Pre-indictment Motions.*—The leading case is *In re Sana Laboratories*, 115 F. 2d 717 (1940), certiorari denied, 312 U.S. 688. There an order which denied a motion to suppress books, papers, and records seized without warrant by Alcohol Tax Agents was held appealable although the order was made after the return of an indictment. This principle has been followed with little discussion in: *United States* v. *Bianco*, 189 F. 2d 716 (1951) (order granting a pre-indictment motion to suppress lottery materials seized incident to arrest); *United States* v. *Murphy*, 290 F. 2d 573 (1961), pending on a petition for a writ of cer-

tiorari, No. 317, this Term (order denying a motion filed before indictment but after arraignment to suppress sugar and currency seized incident to arrest). See also *Dugan & McNamara* v. *Clark*, 170 F. 2d 118 (1948) (order denying a pre-indictment motion to quash a grand jury subpoena *duces tecum* held non-appealable under *Cobbledick* v. *United States, supra*).

3. *Miscellaneous.*—In *United States* v. *Sineiro*, 190 F. 2d 397, an arrest warrant was issued by a commissioner in the District of Maryland based on a statement made by the movant to an investigator of the Immigration and Naturalization Service in Philadelphia. The order entered in the District Court for the Eastern District of Pennsylvania denying the motion to quash the arrest warrant and suppress the statement was held to be independent of the criminal case and appealable both because the motion was made before an indictment had been returned against the movant and because it was made in a district other than that where the criminal proceeding was pending.

FOURTH CIRCUIT

Summary

Relying on the "essential character" of the motion, and the "circumstances under which it is made"—the approach stated by this Court in *Cogen* v. *United States, supra*, 278 U.S. at 225—the Fourth Circuit has evolved a flexible rule of appealability. Where a motion for suppression was made after arraignment and was clearly part of the criminal case,

the fact that it preceded the indictment has not been considered decisive. In *United States* v. *Williams*, 227 F. 2d 149 (1955), Judge Parker rejected the time the indictment was returned as the sole criterion for deciding whether an order on a motion to suppress is appealable. In that case he dismissed an appeal by the government because the criminal case had already been begun by arraignment proceedings before the motion was filed. Since this motion solely related to pending proceedings, the court held that the order was interlocutory and not appealable. On the other hand, the court has held that an order granting a motion to suppress and return ballots and other election materials which was made after the indictment was returned was reviewable on appeal by the government. *United States* v. *Ponder* (1956), 238 F. 2d 825. The court reasoned that, since all citizens of the State are entitled to reasonable access to public documents and therefore similar applications to suppress and return could be filed, the case was similar to a motion filed by a stranger to the criminal case, which under *Cogen* is appealable; the impounding of the election materials had an effect beyond the criminal case; the documents were impounded prior to indictment; and the impounding petition and order were separately entitled in the district court from the criminal proceeding which was subsequently brought. The court therefore held that the impounding, seizure, suppression, and return of the documents were in a proceeding which was independent of the pending criminal case.

Cases

1. *Post-indictment Motions.—United States* v. *Ponder*, 238 F. 2d 825 (1956) (see the discussion above). This case was cited in *Carroll* v. *United States*, 354 U.S. at 404, note 17, 406, note 19, as an instance where a post-indictment motion was appealable because it was in fact independent of the criminal case.

2. *Pre-indictment Motions.*—In *United States* v. *Williams*, 227 F. 2d 149 (1955), an order granting a motion made before indictment but after arraignment for the suppression of liquor seized incident to arrest was held non-reviewable on appeal by the government (see the government's brief in *DiBella*, pp. 45–46).

In *Austin* v. *United States*, No. 8317, decided November 21, 1961, the district court denied a motion, based on both the Fourth and Fifth Amendments, to enjoin the United States Attorney from presenting to the grand jury tax records and other information allegedly obtained by fraud, on the ground that it was inappropriate to decide this kind of motion before indictment. No arraignment proceedings or any steps in a criminal case had apparently been held. Without discussing appealability, the court of appeals assumed jurisdiction and directed the district court to hold a hearing on the merits of the motion.

FIFTH CIRCUIT

Summary

Until recently the Fifth Circuit treated orders on motions brought before indictment as automatically

appealable. This rule was applied before *Cogen* to an order denying a motion to quash a search warrant. *Voorhies* v. *United States*, 299 Fed. 275. The same rule was applied after *Cogen* to an order on a motion made after arrest and arraignment but before indictment. *Foley* v. *United States*, 64 F. 2d 1.

Recently, however, the Fifth Circuit has adopted a different rule. In *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935 (see our brief in *DiBella*, pp. 45–46), the court held that an order denying a motion to suppress narcotics seized incident to arrest which was filed after arraignment but before indictment is not appealable. The court reasoned that this motion was related to a pending criminal case and that therefore the order was not final. The rule has been recently reaffirmed and extended to a motion made in the district of seizure which is not the district of the offense, where a complaint had been filed and a commitment hearing held prior to the motion. *United States* v. *Koenig*, 290 F. 2d 166, pending on writ of certiorari, No. 93.

Cases

1. *Post-indictment Motions.*—The Fifth Circuit has refused to allow appeals from orders deciding post-indictment motions: *Knott* v. *United States*, 163 F. 2d 983 (1947) (order denying a motion made prior to trial for suppression and return of money seized incident to arrest); *Peterson* v. *United States*, 260 F. 2d 265 (1958) (order denying a post-indictment motion to suppress money seized without a warrant). See also *United States* v. *Ashby*, 245 F. 2d 684 (1957)

(order granting a motion to suppress records and papers given by the defendant's wife to the Internal Revenue Service and dismissing the indictment); the court of appeals held that the government could appeal the dismissal of the indictment under the Criminal Appeals Act, 18 U.S.C. 3731, but did not decide the question whether independent review could be had as to the suppression order).

2. *Pre-indictment Motions.*—The earlier cases stating, with little or no discussion, that pre-indictment motions are appealable are: *Voorhies* v. *United States*, 299 Fed. 275 (1924) (order granting a motion to quash a search warrant but refusing to order the return of liquor seized under it);[5] *Atlanta Enterprises, Inc.* v. *Crawford*, 22 F. 2d 834 (N.D. Ga.) (1927) (in a proceeding in the district court to test the validity of the seizure of prize fight films under a search warrant, the district court said that its order would be appealable); *Foley* v. *United States*, 64 F. 2d 1 (1933), certiorari denied, 289 U.S. 762 (order denying a post-arraignment motion challenging the seizure of documents, books, papers, and records seized under a search warrant); *Eastus* v. *Bradshaw*, 94 F. 2d 788 (1938) (appeal by the United States Attorney from an order issued pursuant to a formal bill in equity enjoining all government agencies forever from using writings, statements, and memoranda delivered to the Internal Revenue Service in any criminal case); *Turner* v. *Camp*, 123 F. 2d 840 (1941) (order denying a petition to restrain the United

[5] This case was explained in *Cogen*, *supra*, 278 U.S. at 226-227, note 5, as based on the National Prohibition Act.

States Attorney from using before the grand jury a truck and liquor seized incident to arrest); *White* v. *United States*, 194 F. 2d 215 (1952), certiorari denied, 343 U.S. 930 (order denying a motion to prevent the government from using in a threatened criminal prosecution books and papers given to internal revenue agents); *United States* v. *Harte-Hanks Newspapers*, 254 F. 2d 366 (1958), certiorari denied, 357 U.S. 938 (appeal by the government from an order granting the defendant's motion to suppress books and records obtained under a subpoena *duces tecum* from being used before the grand jury).

The later cases which have refused to apply the time of indictment as automatically determining appealability are: *Zacarias* v. *United States*, 261 F. 2d 416 (1958), certiorari denied, 359 U.S. 935 (see the discussion *supra*, p. 18); *Saba* v. *United States*, 283 F. 2d 244 (1960), pending on a petition for a writ of certiorari, No. 34, this Term. In *Saba* the district court denied a pre-information motion to suppress and return money and other items* seized incident to arrest. Relying on *Zacarias*, the court of appeals held that the order was not appealable.

3. *Miscellaneous.*—In *United States* v. *Koenig*, 290 F. 2d 166 (1961), pending on writ of certiorari, No. 93, the court of appeals held that an order granting the suppression of evidence, but not its return, made in the district of seizure, which is different from the district

*The defendant's counsel in *Saba*, however, stated at the hearing that he would not be satisfied with return of the materials seized if they could be used at the trial. See the government's brief in opposition, No. 34, this Term, p. 6. Thus, the motion was in effect a motion to suppress alone.

of the offense and indictment, is not appealable by the government. The motion was made after a complaint had been filed and a commitment hearing held in order to obtain the suppression and return of large sums of money (which were allegedly stolen), slacks, sunglasses, and various other items.

SIXTH CIRCUIT

Summary

In an early decision, the Sixth Circuit held that a petition to quash a search warrant issued under the National Prohibition Act and seeking the return of alcohol seized under it was an independent proceeding and was therefore appealable even though the petition was filed after the return of the indictment. The court, in reaching its decision, emphasized that the petition sought the return of the items seized, relying upon *Perlman* v. *United States,* 247 U.S. 7, and *Burdeau* v. *McDowell,* 256 U.S. 465. *Dowling* v. *Collins,* 10 F. 2d 62, 63–64, certiorari denied, 270 U.S. 660. Subsequently, the Sixth Circuit held without discussion that an order denying a post-indictment motion to suppress is interlocutory and non-appealable. *Thomas* v. *United States,* 128 F. 2d 617.

The primary concern in the recent decisions has been whether a district court should entertain a pre-indictment motion for the suppression of evidence which is based on other than Fourth Amendment grounds. The Sixth Circuit has taken the position that only violations of the Fourth Amendment can be raised and decided before indictment. The court

seems to have assumed that orders deciding pre-indictment motions based on the Fourth Amendment are appealable.

Cases

1. *Post-indictment Motions.*—*Dowling* v. *Collins,* 10 F. 2d 62 (1926), certiorari denied, 270 U.S. 660 (see the discussion above). This case was explained in *Cogen, supra,* 278 U.S. at 226–227, note 5, as being based on the special provisions of the National Prohibition Act. In *Carroll, supra,* however, 354 U.S. at 394, the Court suggested that the decision was based on the fact that the motion emphasized the return of property rather than its suppression as evidence.

Thomas v. *United States,* 128 F. 2d 617 (1942) (see the discussion above).

2. *Pre-indictment Motions.*—The cases, in which the Sixth Circuit has assumed, without discussion, that pre-indictment motions based on Fourth Amendment grounds are appealable, are: *Benes* v. *Canary,* 224 F. 2d 470 (1955), certiorari denied, 350 U.S. 913 (motion to enjoin the United States Attorney from presenting to the grand jury books and records allegedly obtained by internal revenue agent under false pretenses); *Biggs* v. *United States,* 246 F. 2d 40 (1955) (petition to suppress before the grand jury books alleged taken by revenue agents under falso pretenses).

SEVENTH CIRCUIT

Summary

Prior to *Cogen,* the Seventh Circuit indicated that a pre-indictment motion was final and therefore sep-

arately appealable by reviewing such an appeal without discussion of its appealability. *Veeder* v. *United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675. This position has been reaffirmed after *Cogen*, again without discussion. *Homan Mfg. Co.* v. *Russo*, 233 F. 2d 547 (1956).

Cases

1. *Post-indictment Motions.*—*Socony Mobil Oil Co.* v. *United States*, 275 F. 2d 227 (1960) (order denying a motion for the return of impounded documents originally obtained for grand jury use under a subpoena *duces tecum* held not appealable).

2. *Pre-indictment Motions.*—The court has indicated, without discussion, that pre-indictment motions are appealable: *Veeder* v. *United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675 (order denying a motion to quash a search warrant and for the return of books, accounts, ledgers, and other items seized under it);[1] *United States* v. *Various Documents, Papers and Books of Briggs & Turivas*, 278 Fed. 944 (1921), certiorari denied, 258 U.S. 617 (appeal by the government from an order of a United States Commissioner, granting a pre-indictment motion to quash a search warrant and the return of the books and papers seized under it; the court of appeals held that the commissioner's decision was not appealable but indicated that it would have had jurisdiction to review such an order issued by the

[1] This case is discussed in some detail in *United States* v. *Maresca*, 266 Fed. 713, 723 (S.D. N.Y.), discussed *supra*, p. 4. See also the government's petition for certiorari in *Veeder*, arguing that the order was not appealable. No. 952, Oct. Term, 1917.

district court); *Homan Mfg. Co.* v. *Russo*, 233 F. 2d 547 (1956) (order denying a motion to quash a subpoena *duces tecum* and enjoining government officials from using the documents obtained under it before the grand jury).

EIGHTH CIRCUIT

Summary

The Eighth Circuit has held, without discussion, that orders on motions brought after arraignment but before indictment are appealable. *Goodman* v. *Lane*, 48 F. 2d 32 (1931).

Cases

Pre-indictment Motions.—The cases holding that orders on pre-indictment motions are appealable are: *Goodman* v. *Lane*, 48 F. 2d 32 (1931) (order dismissing, without prejudice to its renewal at trial, a post-arraignment but pre-indictment bill in equity which sought suppression and return of liquor seized incident to a warrantless arrest); *Schwimmer* v. *United States*, 232 F. 2d 855 (1956) (order denying a pre-indictment motion to quash a subpoena *duces tecum* issued in a grand jury investigation for books, records, files, log-book, and diaries because it constituted an unreasonable search and seizure).

NINTH CIRCUIT

Summary

The Ninth Circuit decisions follow the same rules of appealability as those prevailing in the Second

Circuit. Orders granting or denying post-indictment motions have long been considered interlocutory decisions which are not independently appealable. *E.g., Jacobs* v. *United States,* 8 F. 2d 981 (1925). Orders on preindictment motions are deemed appealable even though the motion was not made until after the complaint in the criminal case was filed with the commissioner and the movant was bound over for grand jury action. *Freeman* v. *United States,* 160 F. 2d 69 (1946). The rationale in *Freeman* seems to be, as in the Second Circuit, that the commissioner's power is exhausted when the suppression proceeding is heard before the district court and therefore the suppression proceeding is not part of a pending criminal case.

Cases

1. *Post-indictment Motions.*—The cases holding that orders deciding post-indictment motions are not appealable are: *United States* v. *Marquette,* 270 Fed. 214 (1921) (government appeal from an order granting a motion for suppression and return of liquor seized without a warrant); *Jacobs* v. *United States,* 8 F. 2d 981 (1925) (order denying a post-information motion to quash a search warrant and suppress property seized under it); *United States* v. *Rosenwasser,* 145 F. 2d 1015 (1944) (government appeal from an order granting a post-information motion to suppress books and records seized without a warrant).

2. *Pre-indictment Motions.*—The Ninth Circuit's decision that pre-indictment motions are appealable are: *Freeman* v. *United States,* 160 F. 2d 69 (1946) (order denying a motion filed before indictment but

after complaint for the return of documents seized under a commissioner's warrant); *Weldon* v. *United States,* 196 F. 2d 874 (1952) (minute order denying a motion made after preliminary hearing to suppress and return money, a cigarette case, an index card, and two bills of sale seized incident to arrest, held not be appealable; the court of appeals noted that, if an actual order had been entered by the district court on the motion, the order would have been independently appealable); *Hoffritz* v. *United States,* 240 F. 2d 109 (1956) (order denying a motion to suppress books, records, checks, receipts, and invoices allegedly obtained by revenue agents through fraud and trickery was held appealable even though an indictment was returned while the cause was pending on appeal).

TENTH CIRCUIT

We have found no Tenth Circuit decisions on this issue.

DISTRICT OF COLUMBIA CIRCUIT

Summary

The District of Columbia Circuit has held that an order granting a motion to suppress narcotics filed after indictment was final in relation to the government and therefore was appealable, even though an order denying such a motion would not be final as to a defendant. *United States* v. *Cefaratti,* 202 F. 2d 13, certiorari denied, 345 U.S. 907; *United States* v. *Carroll,* 234 F. 2d 679. This position, however, was over-

ruled by this Court's decision in *Carroll* v. *United States*, 354 U.S. 394.

The Court has held that orders on pre-indictment motions are appealable only if the order is made before the indictment is returned. *Nelson* v. *United States*, 208 F. 2d 505, certiorari denied, 346 U.S. 827.

Cases

1. *Post-indictment Motions.—United States* v. *Cefaratti*, 202 F. 2d 13 (1952), certiorari denied, 345 U.S. 907 (see the discussion above); *United States* v. *Carroll*, 234 F. 2d 679 (1956), reversed, 354 U.S. 394 (see the discussion above).

Even though, prior to *Carroll*, the District of Columbia Circuit allowed appeals by the government from orders granting post-indictment motions to suppress made under Rule 41(e), F.R. Crim. P., in *United States* v. *Stephenson*, 223 F. 2d 336 (1955), the court held that an order of the district court granting the defendant's post-indictment motion to suppress a recording and the transcript of a telephone conversation was not appealable. The court reasoned that, since the motion did not involve an illegal search and seizure, it did not come within Rule 41(e) and therefore the district court might decide to admit the evidence at trial; consequently, the court said, the order was not final as to the government and was not independently appealable.

2. *Pre-indictment Motions.*—In *United States* v. *Mattingly*, 285 Fed. 922 (1922), the court held that an order granting a pre-information motion for the suppression and return of liquor seized under a

search warrant was interlocutory where the information was returned prior to the entry of the order. The court, however, did not indicate that the reason for its determination was that the indictment was returned prior to the order. On the other hand, in *Nelson* v. *United States*, 208 F. 2d 505 (1953), certiorari denied, 346 U.S. 827, an order denying a pre-indictment motion to suppress papers obtained by a Congressional committee was held to be interlocutory and non-appealable, because the indictment was returned before the order was issued.

3. *Miscellaneous.—Dickhart* v. *United States*, 16 F. 2d 345 (1926). The court held that an order denying a motion for the return of liquor seized under a search warrant where the motion was made after the movant had been acquitted on the criminal charge was appealable. This decision was cited in *Cogen* and *Carroll* for the proposition that an order is appealable when the motion is filed after the termination of the criminal case. 278 U.S. at 226; 354 U.S. at 403–404.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FELT,
Attorneys.

MARCH 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962